

**United States**  
**Court of Appeals**  
**For the Ninth Circuit**

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STEPHEN GRANAT, as Administrator of the  
Estate of Mary A. O'Keefe, Deceased,  
Appellant,

vs.

WALTER SCHOEPSKI,  
Appellee.

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BRIEF OF APPELLANT

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Upon appeal from the District Court of the United States  
for the District of Montana.

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DOEPKER & HENNESSEY,  
Medical Arts Bldg.  
Butte, Montana;

**FILED**

**MAR 25 1959**

GRANAT & COLE,  
Malta, Montana,

**PAUL P. O'BRIEN, CLERK**

Attorneys for Plaintiffs and Appellants.

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No. 16125

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APPELLANTS' BRIEF

This appeal is taken from a judgment in favor of the appellee, Walter Schoepski, in three cases, two of which were brought by Stephen Granat, as administrator of the Estate of Mary A. O'Keefe, in the capacity of trustee for the heirs and in the capacity of suing for the injuries and damages sustained by Mary O'Keefe and for her conscious suffering after an action is claimed to have survived to her and was prosecuted by Stephen Granat, as her personal representative under the provisions of the laws of the State of Montana.

There is no question in this appeal relating to any matter except the finding by the Court that Mary O'Keefe was responsible for the collision, and all other matters contended for in this appeal are derivative from the claim on the part of appellant that this finding, which was made by the Court, is completely contrary to the physical facts of the case and that it could not be established by any competent evidence that said deceased, Mary O'Keefe, was driving on the wrong side of the bridge.

The matter arises because of a collision between a Buick car driven by Mary O'Keefe, who was a Canadian citizen, and a car driven by Walter Schoepski, who was a citizen of the State of Wisconsin at the time of the casualty in question and also at the time that the case was filed, so that the jurisdiction of the Court is established by the diversity of the citizenship of the individuals who are respectively plaintiff by personal representative and defendant in his own proper person. The statutory provisions believed to sustain the jurisdictions are, the statutory provision appearing 28 U. S. C. A. Section 1332, the jurisdiction of this Court follows the statutory provision allowing appeals 28 U. S. C. A. Section 1291, the pleading showing the jurisdiction of the Court appears on page 3, 4 and 5 of the record, the Notice of Appeal to this Court appearing on page 60 of the record and the bond on appeal appearing on page 61 of the record.

### STATEMENT OF THE CASE

On the morning of August 30th, 1955, Mary O'Keefe was driving her Buick automobile easterly along U. S. Highway No. 2 in Phillips County, Montana, approxi-

mately 12 miles easterly of the city of Malta, Montana, upon a hard surfaced highway approximately 22 feet wide, with a black top surfacing and shoulders running along the black top. The defendant, Walter Schoepski, was driving a Pontiac automobile westerly towards the city of Malta, and the two cars came together on a bridge, the width of which, for the entire length of the bridge, was approximately 19 feet wide. The two automobiles were approximately six (6) feet wide each. The cars collided approximately one-third of the distance of the bridge from the easterly end thereof, and in the collision Mary A. O'Keefe sustained injuries from which she died, and Walter Schoepski received permanent bodily injuries.

The Pontiac automobile remained on the bridge as it came to a stop after the collision. The Buick automobile was proceeding on and along the southerly half of the highway in an easterly direction, and markings on the bridge indicate, as is contended for by appellant, that the Buick automobile was driving parallel to the bridge from the time that the automobile entered the bridge until the collision, and in the collision, which was almost a head-on collision, the cars were considerably damaged and the Buick automobile continued on after the collision gouging and scraping the bridge timbers and then traveling in an arc over the easterly end of the bridge and down into the borrow pit that existed at the easterly end of the bridge.

The material physical facts that demonstrate that the decision of the Judge was clearly erroneous on the facts and the evidence will be presented in detail for the consideration of this Court, and the evidences of the collision, with the exception of very slight changes upon the ground,

were left in the position so that the officers who investigated the accident had an opportunity to observe the physical facts regarding the collision itself, which appellant contends demonstrates that the Pontiac automobile crossed over from the north to the south lane of traffic and collided with the Buick automobile in its own lane of traffic.

All of the points that have been urged in our transcript on appeal arise because of the finding of the Court to the effect that Mary A. O'Keefe was on the wrong side of the bridge and was responsible for the collision. It will be abundantly shown by our Brief and reference to the evidence in the Exhibits that from the standpoint of physical facts that this finding is absolutely and entirely impossible of being correct because, as will be shown in our argument, if Mary O'Keefe was on the north half of the bridge and was responsible for the collision, the evidences would most certainly be there in abundance. Therefore, we will start out in our statement of the case with a reference to the Exhibits.

At the outset, we advise the Court that a series of photographs taken upon the day in question, while the Pontiac automobile was still on the bridge and while the Buick was in the borrow pit, having passed on through and swerved over to the left after the collision, the photographs so taken were marked on the negative from one (1) on through fifteen (15) inclusive. So there won't be any confusion in the mind of the Court, the photographs which have the numerals shown as having been on the negative before the picture was printed will all refer to plaintiffs' exhibit 4, subdivision 1 through 15, and without reference to the Exhibit 4 in each instance, we will simply, for the



purpose of these photographs that we are considering, mention them as the numerals appearing in plaintiffs' exhibit 4 which will be explained in the appendix to this Brief.

Photos number 7 and 8, for the purpose of starting this statement of the case, show the highway involved and the place of the collision from two different positions. One, looking west, which is photograph number 7 of plaintiffs' exhibit 4, and photograph 8 is the same highway looking east. These two photographs show the scene of the accident, and it will be observed by photograph number 7 that a driver traveling westward as Mr. Schoepski was in this case and never having been over the roadway will be unable to see the bridge in question until he reaches the narrow bridge sign which appears on the right of photograph number 7. The bridge in question is down below the top of the knoll that appears in this picture, but a driver must pass this narrow bridge sign before he will be able to see the bridge where the casualty occurred.

On the contrary, on picture number 8 this is the view as a motorist is traveling east and the entire bridge is visible from this position, and both of these photographs were taken approximately 500 feet away from the bridge where the casualty happened, but it is abundantly shown by photograph number 8 that the highway, as it proceeds towards the bridge, goes toward the bridge in a gradual manner and that the width of the traveled portion of the bridge is the same as the width of the black top on the highway. These two photographs will show the scene of the collision and the points that will be referred to from time to time when we reach the argument in this Brief.

Photographs 9 and 10 of plaintiffs' exhibit 4 will show the bridge looking north and south. Photograph number 9 is taken directly from the south side of the bridge and the bridge timbers appearing closer in the picture are the ones upon which the markings of the red Buick and the splintering of the sleeper and the uprights and the bridge timbers are shown in other photographs. Photograph 9 of plaintiffs' exhibit 4, the camera is looking north and photograph number 10 the camera is looking south, but likewise shows the north railing of the bridge nearest in the photograph.

Photograph number 2 of plaintiffs' exhibit 4 shows the Buick involved in the accident, which was driven by Mary A. O'Keefe, in the borrow pit in the position that it went around the eastern end of the bridge after the collision, and in the foreground of the photograph, near the northeast corner of the bridge, appears some debris which will be referred to later in our argument and appear in the testimony of one of the witnesses for the plaintiff. The wrecker appearing on the right edge of the picture was, at the time the photograph was taken immediately following the collision and as soon as the wrecker could get through the bridge after the Pontiac was moved sufficiently to enable the wrecker to get there. The wrecker is seen engaged in the task of prying open the door of the Buick so that the body of Mary A. O. Keefe, behind the driver's seat, could be removed and gotten out of the Buick.

Photographs 3, 4 and 11 show the Pontiac on the bridge after the collision and the position of the Pontiac will be observed in picture number 3 in connection with a smudge



on the top railing of the bridge so that the matter is now directed to the attention of the Court to show the position of the Pontiac after the collision and the evidence will show when this photograph was taken that it was a short time after the collision with the automobiles looking west that are unable to get through the bridge and the smudge upon the top rail of the bridge, the evidence will show, occurred in the collision when the rear end of the Pontiac automobile was thrown upwards and over against the bridge rail in the collision, and this photograph also shows the crease in the top of the Pontiac which was made in the collision and to which reference will be made. This photograph also shows a part of the fender of the Pontiac which had been removed before this picture was taken so that a laundry panel carrying the injured could get through, and then the fender was replaced, as some of the evidence will show, in the same position that it was after it had been apparently stripped loose as the Buick went through in this area. Photograph number 3 also shows the scraping in this area which was made by the Buick as it went along the south rail of the bridge, and the gouging of the bridge timbers that occurred in the collision to which reference will be made in our argument in this Brief.

Photograph number 4 shows the picture taken of the Pontiac automobile looking eastwardly and showing the liquid that had run out of a part of the Pontiac automobile as it drained towards the west and towards the north. The smudge on the top rail is shown off to the back of the Pontiac and the evidence will show that this is the only marking that occurred on the north rail of the bridge in this accident. On the opposite side of picture number 4,

the scrapings along the south rail, made by the Buick automobile can be seen and will be referred to in our argument. This picture was taken after the wrecker had gotten on the opposite side of the bridge and was engaged in extricating Mary A. O'Keefe from the Buick automobile in the borrow pit which can be seen imperfectly through the north rails of the bridge. The gradual rise from the bridge to the east also can be observed in this picture number 4.

Picture number 11 shows the wrecker lining up in position to get the Pontiac pulled off the bridge so that the traffic on each side of the bridge could pass through, and the position of the Pontiac and the angle in which it appears will demonstrate the position that the Pontiac automobile got into after the collision, and later in the argument the position of this car and the relative position between it and the markings on the bridge and a gouge mark in the south lane of travel will be referred to in the testimony of the highway patrolman who was on the scene very soon after the accident and before the automobiles had been removed and while the traffic was still backed up on each side of the bridge from which he determined, in his opinion, where the point of collision occurred.

Photograph number 5 shows a close-up of the Pontiac automobile and a wrecker that appears in the picture to the left, immediately ahead of which is an ambulance and then from there on eastward, trucks and automobiles that were standing along the highway because of being blocked by the Pontiac still on the bridge. On the right hand side of picture number 5 is shown the gouging of the bridge timber at the base and the bridge timbers on the south

rail of the bridge. This picture also shows the gradual incline to the east where the position of automobiles beyond the rise in the road may be observed in this photograph. The position of the wrecker in picture number 5 was referred to in the testimony of one of the witnesses, Pat West, indicating the position which he claimed that he was in following the collision, claiming that he had followed the Pontiac down to that point. The Court will examine also the testimony of Mabel Keough who testified that she was the one that was following the Pontiac automobile and that it was her automobile that was in the position where this wrecker is shown in picture number 5 of exhibit 4, and that it was at this point that her laundry panel was stopped after she observed the wreck from the brow of the hill and immediately proceeded down to this point and took care of the two O'Keefe children until they could be removed to the hospital. The conflict between the testimony of Pat West and this witness will be referred to in our argument in support of our contention in this case.

Photograph number 6 of plaintiffs' exhibit 4 is taken from the south east of the bridge and shows a wrecker, the ambulance, a cattle truck to the east of the bridge, the Pontiac on the bridge, the other vehicles, one of which is shown with the flasher light to the top which is on the west side of the bridge, and the line of traffic that is backed up from the bridge westerly being unable to get through because the Pontiac shown was blocking the traffic so the traffic could not get through, and this also will be referred to in connection with the testimony of Pat West, who claimed that he drove a Ford station wagon

through the bridge, the first one to cross after the accident, and this also will be referred to in our argument.

Photograph number 12 of plaintiffs' exhibit 4 shows the bridge timbers, the places where it was gouged out by the Buick, a scuff mark which is referred to in the testimony of the highway patrolman and a gouge mark which is referred to in the testimony of the highway patrolman, and also the position of the wrecker which is shown relative to the place that the Buick automobile wound up in the borrow pit with the debris shown at the north easterly edge of the bridge and the hill immediately to the east of the bridge, this picture is taken looking to the east after the Pontiac had been removed from the bridge, and most of the traffic had passed on through after the accident. The wreckers are engaged in the prying of the Buick apart so that the body of Mary A. O'Keefe could be removed. After the body had been removed and the body taken into the funeral parlors in Malta which are about 11 or 12 miles westerly from this bridge in the town of Malta, Montana.

Photograph number 1 is a close-up of the Buick taken while the Buick was in the borrow pit showing the manner in which the left side of the Buick automobile was crushed in and showing the body of Mary A. O'Keefe still in the front seat of the Buick automobile after the collision, and the damage to the Buick automobile on the front left side, while the Buick was in the borrow pit immediately to the east and in the borrow pit to the north of the highway after the accident.

Picture number 14 shows the condition of the Pontiac automobile following the collision and after the Pontiac

had been removed from the bridge in question to the southwest of the bridge and shows the position of the impact of the Pontiac automobile and the wrecked condition, including the crease in the top of the Pontiac which will be referred to later in the argument demonstrating that the impact between the two automobiles was not one of a hooking a front end of the Pontiac and dragging it across the bridge, but rather a direct impact between the left front of this Pontiac directly so that the Pontiac was spun around and lifted without progressing further westerly into the bridge into the position that it is shown in the photographs taken immediately after the casualty.

Photograph number 15 also shows the condition of the Buick automobile, the position of the force of the blow, the tearing of the under structure of the Buick, something of which, the evidence will show, made the gouge marks which indicated the point of collision in the south lane of the bridge as testified to by patrolman Hardesty, and the condition of the Buick after it had been removed from the borrow pit and taken to a garage yard in Malta. Picture 14 and 15 showing the respective position of the left sides of the two automobiles which were involved in the collision and after the casualty in question.

There are three dimension slides also marked as exhibits which will show the condition of the automobiles and the markings on the bridge in color and which will be referred to in the testimony when we reach the argument in connection with the case in this Brief. The stereo exhibit number 8 is a 3-D stereo which, when viewed through a viewing box, will show the front of the Pontiac and which shows the front of the Pontiac indicating the direct

crash against the Buick and other points which will be referred to in our argument.

Plaintiffs' exhibit 9, a 3-D stereo, looking through the viewing box, shows the left front of the Buick automobile as it was crushed backward from the letter 'k' of the 'Buick' on the front, over the entire left front, and will be referred to in our argument in this Brief.

Plaintiffs' exhibit 10 is a 3-D stereo that illustrates in color and three dimensions the left side of the Buick as it is crushed towards the right side of the Buick.

Then outside of the plaintiffs' exhibit 4 and directly numbered pictures, which will be identified by their not being any numbers shown in the negative, but which will be identified by the identification marks on the exhibits, 11, 12, 13, 14, 15 and 16. These are all photographs taken in the garage after the Buick was removed from the barrow pit and show the entire right side of the Buick automobile indicating that in the collision, the point of which we will argue, is demonstrated by physical facts, the Buick was forced up over the bridge timber or sleeper at the bottom of the bridge against the rail which is demonstrated by the crushed front right hand tire and the scraping along the entire side of the Buick which shows that the force of the Pontiac in the collision as it came into the lane of the Buick, pushed the Buick, the right front end, up on the sleeper and the remainder scraped along the bridge rails as is indicated by the photographs and three dimension slides and that show that the Buick was scraped from the front of the hole in the right fender clear back to the back end and the bumper as the Buick passed between the Pontiac, up on the bridge sleeper, until it dropped



down and swerved around into the barrow pit north of the bridge.

Exhibit number 17, being a 3-D slide, shows the guard rail of the bridge and the markings upon it. Plaintiffs' exhibit 18 stereo is a closeup of the same area showing the paint scrapings extending to the west at a point 45 feet from the east end of the bridge. Plaintiffs' exhibit 19, the 3 dimension slide, shows the bridge 40 feet from the east end of the bridge.

Plaintiffs' exhibits 21, 22 and 23 are 3-D stereos showing that the Buick was pushed against the south rail for a distance of twenty to forty-five feet from the east end of the bridge.

The stereo, plaintiffs' 25, indicates the highway coming over the knoll and that the highway was perfectly straight ahead.

Exhibit number 34, which is the sketch upon which the witness Stanley Hould, made a drawing showing the position of the bridge and the relative position of the bridge and the timbers and the posts as well as the dimensions which later were confirmed by the testimony of the highway patrolman, who indicated upon this sketch the conditions and the physical facts which appeared immediately following the collision and which indicated the position that the cars were at the point of impact, and which later in our argument we will show are physical facts which make the finding of the Court that Mary A. O'Keefe was traveling on the north lane and over the center line and fixed upon her the responsibility for the collision was clearly erroneous, in fact impossible to have happened under the physical, demonstrative evidence that is shown in this case.

## SUMMARY OF THE EVIDENCE

RAYMOND O'KEEFE (Tr. 77-87, 322-324).

The testimony of Raymond O'Keefe will be analysed in detail later in the Brief, but it is sufficiently to briefly state that he is and was at the time of the casualty a resident of the Province of Ontario, County of Essex, near Windsor, Canada, and was driving in the State of Montana and riding in the State of Montana on the 30th day of August, 1955, and at the time involved in this casualty, he was riding in the car and it was being driven by his wife, Mary A. O'Keefe, and in the car were the two children, Catherine and Michael. On the day in question, at about 9 o'clock or 9:30, the wife was driving and they were approximately 12 miles westerly from the city of Malta and approximately 100 miles from the city of Havre which they had left about 5:20 of the morning in question. They approached the bridge in question. Mary O'Keefe had considerable experience in driving automobiles and had been driving for 10 or 12 years; and in the last 4 or 5 years before the casualty, she had been driving every day, both pleasure and business; operated motor driven equipment, tractors and trucks; she had reached the age of 36 on the 30th of August, 1955.

Raymond O'Keefe was occupying a position in the center of the rear seat as they were traveling eastward. The bridge came into view approximately four or five hundred feet ahead. The road was straight for quite a ways, and during this time, Mary O'Keefe was continually driving on the right hand side of the highway unless she would overtake an automobile. She was traveling at an estimated



speed of 40 to 45 miles per hour, and at the time in question, she may have slowed to 40 as she was coming toward the bridge; and she continued on her own right hand side as she came upon the bridge; and did not swerve away from her right hand side.

As to the traffic on the highway, he saw an automobile coming from the east, which was the Pontiac involved in the accident and he did not observe any other cars in the immediate vicinity at the time. The Pontiac car was coming down the incline towards the bridge from the east, and when it got very close to her, coming upon or on the bridge, it seemed to sway right at her. Mr. O'Keefe raised up in the back seat. The incline that he mentioned was a couple of hundred feet from the bridge to the east, and he believed the incline started 30 or 40 feet easterly from the east side of the bridge; and before he saw the car coming down the incline, he did not see it on the highway to the east because when you got back far enough you cannot see the bridge over the incline to the east. In describing his remembrance of the collision, he saw the car coming at them, it seemed to be coming fast and swerved just before it got on top of her, immediately before the collision. The actual impact which took place on the bridge towards the easterly end of the bridge and in the instant immediately before the collision, the Buick car was near the right rails and the impact between the two cars occurred. As near as he could remember, the Pontiac car hit the front end of the Buick car as the cars came together in their front ends. Immediately after the collision, the Buick car turned in a northerly or left hand direction and went into the ditch or barrow pit. He made a casual observation of

the position of the left front wheel and it had been driven upwards and back, and the Buick car followed the crushed position of the front wheel in swinging around after the accident into the barrow pit. He observed the position of Mr. Schoepski's automobile immediately after the collision, and it was on the bridge, heading to the left side to an angle to the south side, and it was across the center line of the bridge to the south.

Mary O'Keefe slowed the car, which she generally did, as she came upon this bridge.

The actual impact took place on the bridge; towards the easterly end of the bridge; and in the instant immediately before the collision, the Buick car was near the right rails and the impact between the two cars occurred.

From where Mr. O'Keefe was seated there was no obstruction to the view ahead and there were no obstructions on the other side of the bridge, except, of course, the hill that rose to the east, and there were no other cars in the immediate vicinity at the time of the collision, immediately before the accident.

WALTER SCHOEPSKI (Tr. 284-289).

Walter Schoepski, the defendant and driver of the Pontiac, testified that he lived in Beloit, Wisconsin; was 60 years old and was 59 at the time of the accident; had been driving automobiles since 1927; he was riding with his wife; he left Beloit in August, 1955; and they were in Williston, North Dakota the day before the accident; stayed there over night; it was dark when he left Williston and he had the car lights on traveling westward; he came upon the narrow bridge sign at a point east of the bridge and he took his foot off of the gas and pressed on the brake a

little to slow it up; he saw the automobile coming from the west towards him, and he continued on after passing the sign at the brow of the hill; he would say that the Buick automobile was about to enter the bridge at the same time that he did; he knew it was a narrow bridge and he was trying to hug the rail and stay on his own side of the highway because he knew he was on a narrow bridge, and he stayed on the right side of the highway, and he continued to hug the rail at the bridge which had been identified as the north rail of the bridge; his car didn't sway or jump like a frog; the mechanical condition of the car was o-kay; he said his eye sight was good; he was a machinist and working in a machine shop, working with a boring bar; he doesn't recall exactly what happened at the time of the collision or the impact, but he would say he was driving around 40 miles, maybe a little bit less per hour; he recalls entering the bridge, recalls hugging the north railing and the next thing he recalls is after the accident.

On cross examination he reviews his testimony given on direct examination; he didn't recall that the car pulled towards the left as it came down the hill or the last drive to the bridge, and he would say that it did not pull him towards the left as he was sitting there driving; he was on the left side of the car and did not try to make towards the center of the bridge to avoid the north rail; he stayed as close as he could to the north rail, that is what he was watching. As he came over the knoll where the sign said narrow bridges ahead, he had come up there down a slight grade, he saw the Buick ahead and he came up there on that slight grade, he did see the Buick approaching, and

at that time didn't see anything about the Buick that caused him to be concerned at the time, and as far as he can remember he didn't see the Buick off of its own lane at the time, but he is sure that he stayed in his own lane.

#### TESTIMONY OF VERN KAPPHAN (Tr. 118-122).

"I resided about 12 miles northeast of Saco on August 30th, 1955. On that early morning I had occasion to drive from my ranch towards Malta and I arrived at the bridge at the easterly end of the lake, around 9 and 10 somewhere, between 9 and 10. I was going west in a pick-up, it was a Ford pick-up, and my son was with me. Concerning testimony about a wreck that occurred on a bridge, I am familiar with the bridge and I had occasion to drive up to that bridge, or close to that bridge, on that morning. There was some cars on the east side and some on the west side too. There was a Buick car in the north barrow pit, headed north." Which would be on his right hand side as they were coming towards the bridge, and he saw the cars in the vicinity of the bridge; there was one car right on the bridge, it was a Pontiac; there were quite a few people there; there were two children lying on the bank on the highway; there was a lady there, and he thought there was a man laying there; there was a man and woman laying on the highway or side of the highway on the west side of the bridge.

"When we came up there in our car, we walked over. We left our pick-up in line with the rest of them and walked on up, walked right on to the bridge. We stopped a minute or two there by the east of the bridge, where the children were, and where the Buick was in the ditch,

and then I walked right on clear across the west side of the bridge. I never went off the road."

"As I came upon the bridge, I came upon the automobile that was on the bridge, it was pretty close to the center of the bridge. It might have been a little further to the east side than it was to the west side, but it was further south than it was on the north. I would say the front end of the car was over the white line, as we call it. I am speaking of the car that was on the bridge. The car was setting at a little angle, front end I would say was over the white line. I don't know whether there is a white line right on the bridge or not but it was setting far enough, there is no doubt of it, it was over halfways, because when Bill came with the ambulance, I took hold of the fender which was lying out there and pulled it back and several other guys took ahold with me, and I think we moved the car a little bit so he could get through with the ambulance; we moved the car a little to the north, and before it was moved to the north, the front end of the Pontiac was over the center line or on the south of the line." (Record—page 121.) "As we moved the Pontiac car a little to the north, there was some pieces of some car that we moved out of the road there, but I wouldn't know whether they were off of the Pontiac or whether they were off of the Buick; it is pretty hard to say what the pieces were, as far as that goes, but there was pieces broke off of either car, and I don't know which car."

"Looking at plaintiffs' exhibit 4, photographs 3 and 4, I would say that that car was setting on the bridge, and compared to the picture after it was moved by the four men, we moved it straighter; we moved the front end

over and picked the fender up so that he could get through. After the Pontiac was moved from the south side there was somebody drove through there and the man that drove through there was the coroner, Mr. Bell."

#### CROSS EXAMINATION VERN KAPPHAN

"I couldn't tell you right to the inches or feet how far over the white line to the south that the automobile on the bridge was when I saw it; I didn't measure it; there wasn't room enough for a car to go through there; that is why the traffic was held up; there wasn't room to go through until we moved the car; I don't know how many of us moved the car, there were a lot of men standing around there and I couldn't say particularly that I knew any of them that took hold of the car outside of me."

"I would say that the front end of the Pontiac was five or six feet away from the south rail before I moved it. It would be close enough that they couldn't get through with an outfit, just impossible to drive a car through there until it was moved. After we moved it, I laid the parts back down on the road, that is as far as I could. I just moved them out of the road so we could get through with the ambulance. What I moved was right beside the Pontiac. I wouldn't say that there was a white line on the bridge, I don't know.

Before the car was moved and looking at photograph number 3 of plaintiffs' exhibit 4, I will tell you where that fender was. Apparently that is a fender, isn't it, that I am pointing to in the center of the picture?" A. "Yes."

"Before I moved the automobile, the fender was laying right about here. (Indicating.) It was laying pretty close



there I would say, but I don't see how it could have been though after we moved it. We moved it and he went through with the ambulance, I am sure, before the picture was taken. My testimony is that we picked that fender up and he drove through. I wouldn't say that we picked up the front end of the car, we just moved it, we just shoved it over. I didn't see the condition of the left front of the Pontiac when it was shoved over. I did not note whether or not the left front wheel gouged or marked the highway."

Looking at the picture number 3 and looking at the position of the car, I think it was a little straighter than that, and when I moved it, it was over closer to the south rail. It was setting so he couldn't drive through, right the way it was setting there with the fender picked up you could drive through there. Picture number 3 is not in the same position that it was when I first saw it. It was touching the rail here. I don't think it would touch the rail when we come there, I wouldn't say. In picture number 3 of plaintiffs' exhibit 4, it appears that the Pontiac is touching the rail and it wasn't touching the rail when we came there. As to the markings on the bridge, I couldn't tell you whether either side was marked, because I didn't observe the railings on the bridge.

Observing photograph number 5 of plaintiffs' exhibit 4, well, the front was smashed up, but whether it looked exactly like that, we did not pick it up, we just slid it over and moved the stuff out of the way so he could get through with the ambulance. I did not look afterwards to see whether or not it had marked the bridge or the pavement, and I don't know whether or not the left front wheel or

the left front tire had been cut off the rim of the wheel so that the rim was resting on the pavement."

"That fender that is shown in photographs number 3 and 5 of plaintiffs' exhibit 4 was laying right along side of the car, back here a little further I would say, and this front I would say, we moved it back. My testimony is that it was impossible for an automobile to pass between the south rail of the bridge and the front of this car before I moved it."

"The Buick car was through there when I got there. It was in the ditch. The Pontiac could have been moved a dozen times after them pictures were taken if he took them after I was there, which he had to do because I wasn't the first man there. We had picked the people up, or someone else had, I didn't touch any of them, but they were picked up and went ahead into town before we left there; and I didn't see Mr. Coles, the photographer, there at any time that I was there. The cars could have been moved after I left there too. I observed the Buick in the ditch when I arrived at the scene. As to the kind of a car that was parked at the head of the line there to the east, I couldn't tell you that. I don't remember whether or not there was a car parked on the left side, there could have been, at the left side of the entry to that bridge, there could have been, but I don't know. There was a Ford station wagon there that picked up somebody there. I think it was the lumber yard man at Saco, Pat West. At least, the man had a station wagon there that picked some people up, but I don't know whether he was at the head of the line or where he was. As to whether a small panel laundry truck at the east end of the bridge could have



been there, I don't recall that, it could have been. There was a girl taking care of two children. Yes, there was a woman, but I don't know who she was. I would say that we did not move the back end of the Pontiac. I would say 'No' that that wasn't moved. I would say that the back end of the Pontiac was not moved while I was there. I would say that the car had moved quite a bit since the time that we moved it when the picture was taken. I would say, unless it was like you boys was explaining, the width of it, you know, unless it was like your explaining the angle there on it. It doesn't look the same to me. Unless you are setting on an angle like he was talking about the angle of the lense of the picture. The automobile that I have been looking at in these photographs, facing in the same direction when I first got there, it was setting on an angle like that on the bridge. It was standing at an angle on the bridge just about like that. It was heading about what you would call west, I would say, I wouldn't know."

RAYMOND CHARLES HOYNES (Tr. 129-134).

"I am a highway section man, and I was engaged in that work on the 30th of August, 1955. My station was Malta, 14 miles east and 26 miles west on highway number 2. I was working at the station for the highway department on the 30th of August, 1955.

I am acquainted with the bridge that is located toward the easterly end of Bowdoin Lake. The bridge is approximately 12 and one-half miles east and northeast of Malta. I had occasion to go over that bridge on the morning of August 30th and on other days too, and I know the rail-

ings of the bridge enough to know something about their condition. When I came through there on the morning of August the 30th, 1955, I know the condition of the railings on each side of the bridge that morning, and the direction of the bridge in that vicinity is approximately east and west. As I went over it that morning I noticed the railing on the south side or the north side as I went through. I observed both sides. We do every time we go over the bridges, it is a part of our job to look out for anything unusual. On that morning, I would say approximately 9 o'clock, I crossed the bridge going east and I went approximately a mile and a half to the end of my section east past the bridge. On that morning the south rail of that bridge was clear of any marks. They were clear of any markings with an exception of a sliver off or something where it may have done it with a snow plow. As far as the railings and the boards that went along the south side of that bridge, they were free from any scuffing or any splintering that would be noticeable to just casual observation. There were no paint scrapings on the bridge as I went over it that morning. When I returned from my trip about a mile and a half or two from the east, I saw this accident when we came over the hill. When I say the accident, I did not see the accident happen, I saw the result of the accident after it had happened. When I came upon this accident after it had happened, then we just had the one vehicle. We pulled it off to the side of the road and went to see what the accident consisted of. When I got there I did see people around there. I mean that where the accident was, there were people that were involved in the accident. We saw two little children on a

blanket on the shoulder of the road, right at the end of the bridge; and on the other end of the bridge, there was the woman lying on a blanket on the west end of the bridge, on the shoulder of the road. I saw the cars that were involved in the accident, but I did not make too close an observation of the cars. I see that there was one in the barrow pit on the east end of the bridge and the other car was on the bridge. I just casually looked at the automobiles because there was quite a bit of trouble with traffic and I had to take over the traffic situation. There were several men walking around there, and I saw a man walking around there that had apparently been in the accident. That was Mr. O'Keefe. He had blood running all down his face and he had a cut over his eye or some blood running down his face. I just walked past him when I passed the vehicle to get a bar out of the vehicle to try to open the door of the Buick.

You are directing my attention to picture 12 of plaintiffs' exhibit 4 and looking at the railing that appears on the right edge of the photograph there, and I remember the railing that morning; the railing was not in that condition which appears in that photograph when I went through the bridge there that morning going east, but it was in that condition when I came back. I notice that there is a vehicle apparently that is at the east end of the bridge on the north side and I recognize it. When we came back from the east I noticed that vehicle shown in the picture. I couldn't say for sure looking at picture number 13 of plaintiffs' exhibit 4, but as I said before, the bridge was splintered up some, maybe due to a snow plow or something that rubbed it, but I don't know. I don't think that

there was anything on that lower railing before the accident. At any rate, I did notice this middle railing after the accident and did see a condition such as is shown there.

Looking at photograph number 3 which is looking west in the picture number 4 of plaintiffs' exhibit 4, I notice a railing along the north of this picture now, picture 4 of the exhibit 4, we are looking east and I observe a car on that bridge at the time that the picture was taken; and with respect to the railing along the north of that bridge, I did not notice any splintering or paint scratches on the north side of the bridge.

Looking at photograph number 3 which is looking west 4, I look at it and notice that the direction that we are looking in that picture is west, and I observe a sign that appears to the right of the highway, which I am familiar with. On that morning, as I went east, the sign was there and it had been there for some time before that date, and I know what the sign said. It says 'Narrow bridges in the next 10 miles.' I had passed over this area a good many times in my work and there is nothing to obstruct the view of a person approaching along that road. There is a little rise in the road further down, but you can see that sign for several hundred feet and by the shape of it I know that it is a warning sign.

At the time I arrived there, they were removing one of the children. They put the child on a blanket out on the east end of the bridge, on the north side, and this other woman they had carried her up to the other end there and she was lying on a blanket on the shoulder of the road. I also saw a woman in the red Buick, on the east end of the bridge. I went up pretty close to the car and I

saw her. She was crumpled up under the steering wheel and was still alive at that moment, but we couldn't get the car door open.

At the time I first saw the woman in the car, which was after we pulled up here, the children were on the shoulder of the road and another lady was being taken over to the west side. That lady was still alive.

With respect to the south side going back to the south rail, I will tell the Court there was no paint smudges or spots of paint on the south rail that morning when I went out, and when I came back, there were, and the color of those paint smudges were red.

I am familiar with the section from the east end of the bridge on the south side back 6 or 7 posts. The last time I paid attention to them was three or four days ago, and there were paint smudges there at the present time. I have been familiar with those paint smudges about a year with reference to the accident. The first time I saw them, with reference to the accident, was the morning of the accident."

#### CROSS EXAMINATION—Raymond Charles Hoynes

When you asked me if I wouldn't say that all the paint smudges on the south rail of that bridge at the present time had been there ever since the accident, well, I couldn't prove that it was, but I haven't seen any different from the time of the accident up until now, and when my recollection is refreshed a little as to whether there is orange paint smudges on the south rail at the present time, well, you could call it orange if you wanted to maybe. Red paint rubbed along on white paint would make a sort of a

orange paint. White on red will make orange, pretty much so. This particular paint that I saw on the morning of the accident, immediately after the accident, I can't say if there was orange, but there was red paint on the bridge. As to the particular paint that I saw that morning immediately after accident, I can't say that it was orange, but there was red paint on the bridge. As to whether there was orange paint or orange colored paint on the bridge somewhat to the west of where this Pontiac was when I was there that morning, there may be, yes, there is some sort of orange colored paint on there alright. As to whether there was orange colored paint as distinct from anything that might have been red, well, I didn't, as I say, think that there was any difference with the red on the white stretched along the bridge—I might call it all red or orange.

When I was coming back from my assignment that morning at the end of the route to the east, I would say we were back to the bridge about 9:20. We drove a mile and a half there was somebody else there. There was about three cars, probably three vehicles on the east end of the bridge—maybe as many more on the west end, two or three. I stopped on the east end of the bridge behind those vehicles that were there. I can't describe the vehicles now, but I believe there was a laundry panel outfit there, but I wouldn't know the color of it. I don't recall another vehicle to the left when I stopped near the east end of the bridge and I don't remember that. As to whether there was a slight young girl there with a kerchief over her head, I can't say—I didn't pay attention enough to it. I went across to the Pontiac and then turned



around and went back and saw this woman in the car, and they couldn't get the door open so I went back to the truck to get a bar to pry the door open. I didn't see anyone in the Pontiac when I went by it. The people were already out of the Pontiac. When I got to the Buick, the woman was slumped over the steering wheel. I was there when Mr. Coles, the photographer, came, and I think she was still in the same position at that time; and I say when I went to get the bar, the woman was alive.

The narrow bridge sign that appears in picture number 4 of plaintiffs' exhibit 4 was the only sign close to the bridge. There was a sign some miles west, but no sign to the east besides the sign that was there.

I look at the north rail as you show me the photograph number 3 of plaintiffs' exhibit 4 in this case, and the mark of some sort near the post above the right rear bumper of the Pontiac or the automobile that I see sitting there, and I did not observe that gouge on the north rail of the bridge.

PHILLIP VERT (Tr. 139).

For the purpose of saving repetitious testimony, for practical purposes the testimony of Phillip Vert coincides with that of Raymond Charles Hoynes. It appears in the Record—page 139 through 143.

CHARLES McCHESNEY (Tr. 144)

“My name is Charles McChesney and I live at Saco. I follow the occupation of ranching. I have one ranch 12 miles northeast of Saco and one is 50 miles southwest of Malta. I have been engaged in ranching operations al-

most 40 years in this vicinity. I homesteaded near Saco and I have been active there ever since. My work requires that I drive back and forth between the two ranches occasionally, and I had occasion to start the trip from my home to Saco to the ranch south of Malta on the 30th of August, 1955. I traveled over highway number 2 to Malta.

As I was traveling towards Malta, I came upon the accident. It was at a narrow bridge on highway 2, north and a little east of Bowdoin Lake, between Malta and Saco. When I arrived there there were two or three other automobiles ahead of me. I think I was even the third or fourth car. I came from Saco towards Malta, towards the east end of the bridge and I imagine I must have been close to a hundred feet from the east end of the bridge, behind two or three other cars. We were held up there, but when we crossed the bridge later, we drove on the south side of the highway going west.

With relation to the bridge, I stopped in the line of traffic back of the bridge and it would be east of the bridge and about a hundred feet from the bridge, I would say. As I arrived there, I got out of the car and walked over to the first car and noticed Mr. O'Keefe's children lying on the bank, and I think he was lying along side of them. The car that I noticed was a red Buick and it was just east of the bridge with the front end of it hanging over the embankment into the barrow pit. I observed the other car that had figured in the accident or had been involved in the accident and it was a Pontiac car. The Pontiac car, as I came up there, was sitting across the center line, possible the front end of it I would say a little more than three feet across the center line of the marking on



the bridge facing to the southwest. The Pontiac was across the center line to the south facing in the southwesterly direction, and there was not room, when I first came up there, there was not room to pass between the south railing of the bridge and the Pontiac automobile because the Pontiac was too far over the center line facing to the southwest, and there was not room enough for another car to pass it.

While I was there, there was some change made in the position of the Pontiac automobile. Four or five men got ahold of the front end of the Pontiac and skidded it over so that the traffic could go by, and after that was done, the traffic got by through there while I was still there. I didn't remain there, I took my turn going across the bridge after the Pontiac had been moved.

When I look at picture number 3 of plaintiffs' exhibit 4, it appears to be one of the vehicles involved in the collision, that is, the Pontiac. I observe the portion of an automobile lying to the left of the front portion of that car in the roadway there. I was there when that portion of the automobile was placed there. It was placed there so that they could take a picture of the vehicle. I observe picture number 2 of plaintiffs' exhibit 4 and I recognize the other vehicle in that accident. It is the Buick automobile that was involved in the accident, and it is in the position approximately it was when I came up there.

CROSS EXAMINATION—Charles McChesney (Tr. 146).

I observe picture number 3 of plaintiffs' exhibit 4. When I first came up to the accident, as near as I can recall,

that portion of the automobile was lying over here. It was taken out not for the ambulance but for the panel job from Glasgow to take Mr. O'Keefe's children to the hospital. Then it was put back there for the photographer to take the picture. As near as I can remember, the part of the automobile was lying right close to the railing, right close to the bridge railing—about opposite where it shows in picture number 3. I wouldn't say positively as to that because those are some of the minor details that a fellow wouldn't pay particular attention to, but I remember very distinctly that being moved and I don't remember who removed it. I think there were three or four men and they didn't lift the front end of the Pontiac, they just skidded it over. Got down low with main strength, I suppose you would call it that. There were four men, four or five men. As to whether they took hold of the bumper, well no, there was no bumper there. The bumper was pretty badly bent up. They took ahold of most anywhere that they could get ahold of the vehicle and I didn't observe whether some parts would bend or give—I didn't observe that. When they moved the vehicle, I was on the east side of the bridge, probably standing along side of my car—it would be about a hundred feet from the place where the vehicle was located, so that I couldn't see the front of the Pontiac when that moving operation was going on, but I am sure that the Pontiac was about three feet over the center line, but I did not measure from the center line, that is an estimation on my part. Of course, there is actually no center line on the bridge. I was estimating by eye and approximate distance. I think that the bridge is approximately 20 feet wide. I am sure it is

quite narrow. It is more narrow than the paved portion of the highway in the vicinity.

When I first came up there I know there was just a very few cars there. I was either the third or fourth car there, I am sure of that. One of those ahead of me was a laundry panel. I couldn't identify it that is, I couldn't identify who it belonged to. I observed somebody that reported to be a nurse there by the children lying on the highway. There were quite a lot of folks around there before it was over with. When I first got there, there were very few people. I know that the panel truck was there. I don't recall whether there was a green station wagon there or not. I don't recall that. I do not recall whether there was a vehicle parked on the south side or shoulder of the highway to the east of the bridge.

A laundry panel went through after the Pontiac was moved. It had to be moved before the laundry panel went through. I am only speaking of the panel laundry truck. The Pontiac had been moved before it went through and a piece of the automobile that I referred to also had been moved back. I saw the piece of the automobile put back for the purpose of taking the picture and I don't recall who put it back.

CLEO E. COLES (Tr. 108).

We will not relate the testimony of Cleo E. Coles in our Brief because it is the testimony of the photographer who took the pictures and the stereo slides and his testimony appears in the Transcript, beginning with page 108. The testimony is directed to the identification of the respective exhibits and can be conveniently checked

with the exhibits by reviewing the testimony of photographer, Cleo E. Coles through page 118.

GENE SEEL (Tr. page 149) and WAYNE LONG (Tr. Page 161).

These are the men who were operating the wreckers and who removed the two automobiles from the scene of the accident and their testimony appears in the Transcript with the detail of various matters that were concerned with the handling of the automobiles, and their testimony was to show that there was no damage done to the vehicles in question in the process of moving them from the bridge or from the scene of the accident. We are not narrating the testimony because it is directly related to the conditions of the automobiles and the fact that they were not altered in the process of removing them from the scene of the accident, and that they were in the same position for all practical purposes when the photographs were later taken at the respective garages where the vehicles had been removed.

STANLEY JAMES HOULD (Tr. 166).

Stanley James Hould made measurements and prepared the foundation for the sketch, plaintiffs' exhibit number 34. He was examined concerning the dimensions of the bridge and the distances between the posts and the red markings on the south side of the bridge and the bridge timbers to the south of the bridge. He testified that the measurement of the width of the bridge from the base of the sleepers was 19 feet  $27\frac{7}{8}$  inches on the west end and 20 feet 3 inches from the outside of one sleeper log on one side to the outside of the sleeper log on the other side,

which measurement would be only to the inside of the posts or to the inside of the posts on the opposite post across the road, and the distance between the posts varied a little. They varied from 6 feet  $1\frac{1}{3}$  inches to 6 feet 5 inches. These were not differentiated on the sketch because the average distance appears from the testimony. There were 16 posts on the north and 16 posts on the south side of the bridge. He testified as to the paint scrapings and the scrapings on the bridge and he made a record of a particular thing that appeared on the bridge as far as the posts or railings were concerned—24 feet and 8 inches from the west end of the bridge, he found a scrape with paint and white paint scraped off a piece 2 feet and 10 inches long. Then the distance between this first scrape and the second scrape was 14 feet and 1 inches and from the second scrape to the third scrape it was 19 feet 6 inches, and that large scrape was 5 feet 8 inches long and about 1 inch of this 3 by 8 was completely chipped off the top at that point, about 3 feet of it was completely chipped off of it, and that is 38 feet from the east end of the bridge, and to the last indication of it going east would be 32 feet 8 inches. He went from the east end of the bridge on the south side to find the scrapings and gouging that was where the chipping out occurred. The one on the east of the bridge started 38 feet from the east end of the bridge. These are marked on exhibit 34.

He testified that there were paint markings along this side of the bridge. These are marked on exhibit 34.

He testified that there were paint markings along this side of the bridge and that they were red in color.

with the exhibits by reviewing the testimony of photographer, Cleo E. Coles through page 118.

GENE SEEL (Tr. page 149) and WAYNE LONG (Tr. Page 161).

These are the men who were operating the wreckers and who removed the two automobiles from the scene of the accident and their testimony appears in the Transcript with the detail of various matters that were concerned with the handling of the automobiles, and their testimony was to show that there was no damage done to the vehicles in question in the process of moving them from the bridge or from the scene of the accident. We are not narrating the testimony because it is directly related to the conditions of the automobiles and the fact that they were not altered in the process of removing them from the scene of the accident, and that they were in the same position for all practical purposes when the photographs were later taken at the respective garages where the vehicles had been removed.

STANLEY JAMES HOULD (Tr. 166).

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He testified that there were paint markings along this side of the bridge. These are marked on exhibit 34.

He testified that there were paint markings along this side of the bridge and that they were red in color.

WILLIAM C. DOVE (Tr. 213 et. seq.).

William C. Dove, sheriff of Phillips County, Montana, at the time of the collision, went to the scene of the accident. When he first got there there was lots of traffic lined up on both ends of the bridge, and the ambulance had just passed him just before he got to the scene of the accident. The ambulance was going towards the bridge, and passed him as he was on the way. When the sheriff arrived at the bridge, the ambulance was there. His memory was confused as where the ambulance was, finally he said 'I believe it was the west side.' They were loading the people on the west side of the bridge and he helped. As soon as the people were loaded in the ambulance he called for the wrecker and the photographer by radio attached to his car. The photographer got there in a matter of twenty minutes. The first thing he did after he arrived was to help remove the injured, then inquired if anybody had seen the accident. There were quite a few people there and he asked for eyewitnesses. He was left with the impression that nobody had seen the accident. He made an investigation on the ground concerning the accident later after the photographer and the highway patrol arrived. The highway patrolman arrived there just a few minutes later than the photographer. He was informed by the highway maintainance men that they had wanted to move the Pontiac, but they wouldn't allow it to be moved, and they only moved one fender which would have been the left front fender in order to get a car through in order to take the children to town. They showed him where it had been laying and they marked the spot, and that had been swung around to the right out of the road so that the

car could get through to take the children to town. The highway maintainance men pointed out to the sheriff the position in which the fender was before it was moved and he had them show where it had been before they moved it and they moved it back to the same place so that the photographer could take the picture of it.

When the highway patrolman and photographer arrived he made an investigation on the ground and that at the place where the accident took place. He relates his experience then in connection with investigating accidents—(Tr. pages 215 and 216). Later he said he did make an investigation. He was not giving conclusions but will tell what he observed.

There was a Pontiac car sitting on an angle in the easterly portion of the bridge with the front of it across the center line headed in a southwesterly direction. There was the red Buick in the ditch just off the east end of the bridge, sitting right across the barrow pit with the nose of it in the bank on the north side.

With relation to the bridge itself, he observed where the markings on the south side of the east portion of the bridge where a car had scraped along the bridge and there was red paint on the bridge. There was also red paint on the Buick. The highway patrolman and witness measured the markings. Sheriff held the tape while he took the figures down, read the tape and marked it in the report book. The witness noticed the railings on the bridge and noticed with respect to the floor of the bridge debris and there was debris at the front, and looking at it, it would be to the right of the Pontiac assuming where the collision happened, there was debris under the Pontiac there. There

was also debris which he assumed to be acid that probably was radiator fluid in the path where the Buick had taken to go into the ditch, and there was something there that he presumed was acid or radiator fluid and it followed the course which the Buick had taken into the ditch and it was deposited along the south side of the bridge and then in a left angle to the ditch to the back end of the Buick. It seemed to him that the acid and radiator fluid started with respect to the bridge itself as though it was a little ahead of where it hit the bridge or where it scraped along the bridge. That is where it was most prominent, but there was debris along the edge of the bridge also. When he said ahead, he meant ahead of the point where it started to scrape the bridge—east of the point. The debris was on the south side of the road and it swung at an angle around the north side of the road, and with relation to the Pontiac car, the debris was to the south side of the center line and the front end of it there. The front end was on the south side of the center line and there was debris there on the south side of the center line. With respect to this pile of dirt, directing to the position of the Pontiac automobile, this dirt or debris from the Pontiac or in relation to the Pontiac as regards to the center of the highway, was to the south of the center; and with respect to the debris to the west from the Buick car, it was on the south side of the center of the highway. Relating about the identification of his automobile, the sheriff said that he had his blinker lights going. When he arrived possibly a quarter of a mile from the scene there was a lot of automobiles stalled and stopped along there and he had his siren sounding intermittently in addition to the

blinker lights. The blinker lights were on top of the car to the front and a blinker light on his right front fender, which had the legend on it "STOP."

When the ambulance got there he went to the ambulance and there were a group of people around there and as soon as they got the injured in the ambulance, the sheriff asked if anybody had seen the accident. He asked several different times and nobody seemed to have seen it. At least if they did, nobody made themselves known. He spoke up on both sides of the bridge and asked if anybody had seen the accident. He was in his shirt sleeves and his star was showing very plainly. Anybody could see who he was. He wasn't dressed with a suit on, but he had a big nickel-plated star, and he asked the general group if anybody had seen the accident which nobody made a response.

Going back to the debris with relation to the Pontiac car and the place on the bridge. His best recollection is that the debris was in the easterly end of the bridge. The east third portion and on the south half and along the side of the Pontiac which would be the left side of the Pontiac toward the rear so that from the front to the rear and along the edge of the bridge, where he assumed the Buick had passed, there was debris to the left of the Pontiac and debris on the south side along the bridge where he thought the Buick evidently went circling around to go where it was, and the heaviest part of the debris was, with reference to the center of the highway, it would be to the south of the center. With respect to both the Pontiac and the Buick, there was debris to the front and left of the Pontiac and along the side of the Pontiac on the left side in

the position that he saw the Pontiac when he got there, and the other debris was right along the side of the bridge --the south side where the car had scraped the side; and compared to the debris which he described as being near the Pontiac, the debris started right at the front of the Pontiac. The highway patrolman and he measured that across there. It was directly across from the front of the Pontiac at the edge of the bridge and he recalls markings on the bridge that Mr. Hardesty, the highway patrolman, and himself measured. There was some marking on the road in the pavement itself, it was the nature of a gouge or a deep scratch and that gouge or deep scratch, with reference to the position to the Pontiac, it was close to the front of it. The sheriff, Mr. Dove, stayed around the scene of the accident for a period of two hours. He was there until both cars were removed and the highway was cleared. During all of that time he had his badge on his shirt and he had his automobile in the immediate vicinity with the blinkers lights attached to it. On the way out from Malta he possibly could have met cars coming from the scene of the accident. The debris he referred to was pieces of the car, pieces of glass, radiator fluid, dirt that you don't normally find on the highway and pieces of the bridge that were present. It was quite some feet from where the Pontiac was that you still found debris. He believed that there were fragments of glass here.

DOUGLAS HARDESTY (Tr. page 228).

"My name is Douglas Hardesty. My occupation is that of a Montana highway patrolman, and I was such on the 30th of August, 1955. During the early morning of that day I was called to an accident that occurred east of Malta.



I was notified by radio by the sheriff's office of Phillips County approximately 9:50 A. M. I made a note of the time that I arrived at the scene of the accident and it was 10:25 by my watch. When I arrived at the scene of the accident, I found Mr. Dove had already arrived and had been there for some time. Mr. Coles, the photographer, arrived subsequently because after I saw the type of the accident, I called the sheriff's office on the radio and I asked that the photographer be notified, but he had already been notified and was on his way out.

I have an independent recollection of what I discovered there at the scene of the accident and I have a memorandum; I have made a diagram at the time at the scene of the accident and the diagram includes the length of the bridge; the width of the bridge; the distance from the east end of the bridge to the first marks on the south rail; the distance from the east end of the bridge to the mark which I believe to have been made by the Pontiac on the north side of the bridge and the distance from the front end of the Pontiac, in its position that I found it, to the south railing, not the railing itself, but that portion which they call the stringer which is on the road bed. I made measurements to that, that is the effective width and I have my notes here and I can tell you what other measurements were made by me. In addition to those measurements which I described, I measured the gouge mark, a deep scratch, which was between the Pontiac and the south side of the road, and I measured that in reference to its position between the Pontiac and the bridge, measuring to the bridge. I also measured, not with a steel tape, but by stepping off the distance from the east end

of the bridge to the rear of the Buick. I mentioned the length of the bridge and the width and so fourth. I made two measurements in regard to the Pontiac. One from the eastern most position to the bridge and one from the western most position to the bridge. That would be the front end of the Pontiac. It was sitting at an angle. I also measured the length of the marks on the south side of the bridge which I attributed to the path of the car going towards the east which was the Buick, and made a note of a gouge mark which was nearly between the ends of the bridge on the east side with relationship to its distance from the south side and it was in the path that one of the cars took and I made a note of its position. I don't know whether or not it shows on the photograph or anything, but I made a note of it in my notes. I believe that is the extent of the measurements that I made. From the records and the measurements that I have made, I am able to sketch upon the exhibit (34) that is on the board the position of the Pontiac when I arrived there, and the indications that I stated that I had measured on the ground and I can do that—here, the witness during a 15 minute recess makes a sketch on the exhibit.

I have now sketched in some measurements that I made on the bridge at the time that I arrived and during the time of my stay there following this accident. I will indicate my measurements now to the Judge that I made during the recess and show him what they are. I got the bridge to be 96 feet; I measured 19 feet 1 inch, measuring this end of the bridge from the bottom stringer to the bottom stringer on the other side showing only the actual road surface; I measured from the vehicle that was on the

bridge, from this corner to the bridge was 6 foot 10 inches (see sketch exhibit 34); from this corner of the vehicle to the bridge was 6 feet even.

Six feet ten inches is the first measurement and the angle it was sitting was approximately this angle indicated. It is about 8 feet from the bridge to this measurement here. I measured from this end to the first contact of any roughening of the bridge and found it to be 30 feet 8 inches counting a projection which is not shown on his map. Then the bridge is scraped. There is paint on it for a distance of 19 feet in various spots, the last 19 feet 8 inches bore no evidence of contact. The colliding occurred in the first 19 feet measuring from the westerly end of my measurements. I measured all of my measurements from the east end of the bridge.

Now there was a gouge mark on the highway 2 feet 5 inches in length between the Pontiac car and the south railing of the bridge in this relative position indicated on the sketch. The west end of the mark was 5 feet 5 inches from the south portion; the eastern edge of the gouge was 4 feet 7 inches indicating that the gouge had been made at an angle in reference to the length of the bridge. This mark out on the end which I have indicated was a mark I noticed and it apparently was fresh; it was apparently made by one of the vehicles; there was a mark about 2 feet long 5 feet 7 inches from the eastern end of the bridge to the north.

I have now indicated on the sketch the angle of the Pontiac or the approximate angle of the Pontiac car as I found it on the bridge when I arrived there after the accident had happened and I also indicated on the sketch

the first point which there appears a gouge or a paint mark. I have one measurement that I have a note of here that I would like to add here. There is a bumper mark, what I believe to be a bumper mark 5 feet 4 inches on the side of that railing, the south of the railing; 5 feet 4 inches, that is a gouge mark which I believe to have been made by the rear end of a bumper and I don't believe I mentioned this little mark which I have made to the rear of the Pontiac which is 25 feet 4 inches from the eastern end of the bridge and I believe that mark to have been made by the Pontiac's rear bumper.

On that occasion I observed debris or dropping off of automobiles in that vicinity. There was evidence of dirt, wood chips and some radiator fluid, or fluid which I believe to be radiator fluid, strewn around in that area. Before I arrived there someone or some groups had picked up some of the metal parts and placed them more or less in a pile down at the east end of the bridge so I couldn't make any specific marks showing any particular parts of the cars. However, I did observe wood chips, radiator fluid and some dirt. With respect to those wood chips, radiator fluid and articles which I mentioned, and with reference to the center of the bridge, I may show on my diagram here where I show the wood chips; there were wood chips in this particular area right here, in relation to the Pontiac car, it would be south near the point where I saw the scrapings on the bridge itself; they weren't large, but they were present, that is the wood chips. There was some dirt under the front end of the Pontiac which was not apparent. After the Pontiac had been lifted up and moved away, there was a little dirt on the road to the rear of

the Pontiac back here, not a great deal. I recall dirt in this area only along the front end of the Pontiac, there had been some drainings from the Pontiac which had run out of the radiator and had run to the west! I believe one of the photographs show that.

Looking at photograph number 3 of plaintiffs' exhibit 4, I was present when that photograph was taken with reference to the bridge. Photograph 3 of exhibit 4 correctly shows the position of the Pontiac car at the time that the photograph was taken with reference to the bridge; and indicating to Judge Murray the markings on the bridge that I believe was made by a portion of the Pontiac right there, sir, (Indicating) and I will describe that marking. It was a gouge and a mark; it looked as though something had been rubbed along there under pressure; the wood was depressed, and it was a mark such as you would get if you would put a heavy pressure on the board gouged in there; it starts at the bottom and goes up at an angle; the first portion of the mark is lower than the last portion is and it appears on the top railing of the bridge on the north side. I have indicated, of course, on the diagram and the measurement on the east end of the bridge and along the south that bore the markings that have been indicated on this exhibit as nearly as I could and I measured from the extreme end of the bridge; there is a small protruding portion which does not show on the diagram, it is about a foot in length."

Then at page 234 of the Transcript, the witness highway patrolman, Douglas Hardesty, describes the exhibits, photographs and relates the positions in which he found the Buick and other matters. He identifies the red mark-

ings or the paint from the Buick on the bridge; and recognized the markings that appeared on the vehicle itself; and he relates the position of the car in the barrow pit; he related that he was out at this bridge the week before he testified and can tell his Honor that as far as the markings at the easterly end of the bridge are concerned along there, they are approximately in the same position they were right after the accident; they are still out there.

Mr. Hardesty, the highway patrolman, then reviews the exhibits and with particular reference to the colored stereo views referring to number 17, 18, 19, 20 etc. Then with respect to exhibit number 24, he testifies that this exhibit shows the southern end of the bridge in its entirety and this is the best picture, and that shows the whole picture right there; it actually compiles several of them into one picture; these stereo exhibits correctly show the condition that existed on the day of the accident after he got there and examined it. As far as the coloring on the bridge and the splintering on the bridge is concerned, the southern side of the bridge they show the condition. "They are all a little different picture or angle of what I have previously described and marked on the sketch, exhibit 24 is the best one and I believe it portrays the south side of the bridge most honestly. From the appearance upon the bridge or markings approaching from either side, it did not appear that either one of the cars had braked or had brakes applied before the collision.

Then from page 237 of the Transcript through 246, which is made one of our statement of points and will be taken up in detail at that time in this Brief.



The officer later testified on page 254, the length of a 1952 Pontiac was 202½ inches over all and the width 75 11/16 inches; and a 1955 Buick of the series involved, 206.7 inches in length and 76¼ inches in width.

## STATEMENT OF POINTS AND AUTHORITIES

The R. page references appearing in the transcript on page 335 thereof refer to pages in the appellants' Narrative Statement filed with this Court. (See Clerk's Certificate page 330 and 331 of Transcript of Record.)

No. 1. That the Court committed reversible and prejudicial error in its rulings, comments and decisions in the course of the examination of the highway patrolman, Douglas Hardesty, respecting the point of collision of the vehicles on the bridge.

Q. And from your experience as a Montana Highway Patrolman, and from your experience as an officer examining scenes after the wreck, where did the collision take place on the bridge?

Mr. Alexander: Just a minute, that is objected to as calling for the conclusion of the witness.

The Court: Sustained. Do you have any authority, counsel, that he is entitled to make such a conclusion?

Mr. Doecker: Well, your Honor, the only thing that I figured was that a witness of experience looking at a scene after—and describing it first to the Court and showing the position of the vehicles and the markings that appear on the highway, then, he relates a series of facts which your Honor can decide for yourself—

The Court: I don't think it is admissible, but to give you (Tr. 237) an opportunity to present the evidence, I

will reserve ruling on the objection, and he may answer, and you can submit a brief with reference to it.

Mr. Doecker: Well, I would like to make a short qualification of the witness, and then I will call your Honor's attention to a case which my associate has refreshed my memory on.

The Court: Very well.

Q. Mr. Hardesty, how long have you served in your capacity as Highway Patrolman? (Tr. p. 238.)

A. I have served as a Highway Patrolman fifteen and a half years, with exception of the period I spent in the Navy during the war, a four-year period in the Navy during the war. I have had occasion to examine numerous accidents and numerous indications on highways after an accident has happened, and I have had the normal training they give a Highway Patrolman at the beginning. We have a six-week course at that time. Subsequently, we have various courses which are administered the last, a period of about two weeks, which we had traffic investigation data given us. We are supplied with manuals which are published by the Northwestern Traffic Institute of the Northwestern University, and several of our Supervisors have attended there, and they have attended meetings and passed on information they obtained there.

A. Well, I expect that I have investigated over 2,000 accidents, well over that many.

Q. And, now, let me ask you this question: From your examination of the accident in question and the automobiles involved, the markings you observed on the highway, do you believe that you know or reasonably know

where the collision in this accident took place with respect to the bridge?

Mr. Angland: Just a minute, the question is objected to as duplicitous. He asked if he knew or if he reasonably knew. We object to the form of the question.

The Court: Sustained. Find out whether he is telling us what he—whether it is an opinion or a guess.

Q. Well, will you tell us—

The Court: Or if he has an opinion on the matter.

Q. Do you have an opinion, based upon your training and upon your examination of the accident in question, as to the place on that bridge where the collision took place, the impact took place?

Mr. Alexander: Now, just a minute. That is objected to on the ground that the question is duplicitous. It is apparently a sort of a hypothetical question without stating the facts upon which the hypothetical question is based.

The Court: Yes it is. By its very nature it has to be a hypothetical question. Now, you can require him to set forth all the facts that are necessary for the witness to express an opinion.

Mr. Doepker: He has already done that in his testimony.

The Court: Well, I think so, I think that that is true, and we are probably all aware of it, but I think for the record, he would have to show, you would have to ask him what facts he bases his opinion on, the places and the amount of debris, and the amount and places of scrapings and the position of the car when he found it, or the cars, and—

Q. Well, then ask him first in order, to lay a foundation, a question that he can answer yes or no, and ask

him—I ask the witness—I ask you if you have an opinion at this time where the collision between those two cars occurred with relation to the bridge?

A. Yes, sir, I do have an opinion.

Q. And what is that opinion based upon? Relate the things that you are taking into consideration to base your opinion on?

A. Could I step over to the diagram, your Honor?

The Court: Yes.

A. Well, as to what happened back here or back here (indicating) I can't say. There is a condition on the east side of this highway which, unless you correct—

Mr. Alexander: Just a minute, we object to any condition on the east side of the highway.

A. It is related to this thing, in my opinion.

Mr. Doecker: I think he is entitled to answer the question.

The Court: Yes, you may tell what your opinion is based on.

A. All right—which, if you were, at the time of this accident traveling from the east to the west, and didn't make a correction, as you came here, the crown of the road slants from the center to the northerly edge and it is perfectly normal for you to correct—

Mr. Alexander: Now just a moment. We object to the witness testifying what would be perfectly normal under the circumstances—

A. Well, if you don't want to hit the bridge, now let's put it that way.

The Court: *Well, in the first place, we are away of base. He is now testifying and basing his opinion on*

*something that isn't in evidence, so let's go back. If you can't ask him the proper hypothetical question, why it's just too bad. We are not going to have him testify—you better present the proper question to him, or the objection will be sustained. We are not going to let him ramble on. You see, he has already started to talk about something that is not in evidence.*

Q. Well, are there any facts that you have not related about this accident that is required for you to arrive at your conclusion of the place that this accident happened on the bridge?

A. No, sir, this portion back here is my own idea.

Q. All right.

A. The facts which I believe would indicate—

Mr. Alexander: Now, don't state what you believe. Just tell us what the facts are that you are relying on, Officer.

A. All right. This Pontiac has assumed an angle here across the bridge occupying a portion approximately 18 feet, and the left hand front of the Pontiac is six feet 10 inches from the south rail. The south side of the Pontiac, the front portion on the left hand side is six feet from the side. There is red paint extending from two-thirds to three-quarters of the distance across the front of that Pontiac; south of the Pontiac on the bridge railing for 19 feet is red paint from the Buick. The distance through which this Buick would have to pass at the most here is six feet 19 inches. The width of the Buick is slightly over six feet, which would put the Buick up against the Pontiac on this side, and up against the bridge on the other side. There is no evidence of any accident west of that, so it is my conclusion that the Buick—

Mr. Alexander: Now, just a minute. We object to your conclusion, just keep telling us facts.

A. Well, you asked why I thought that.

Mr. Doepker: He has related—

The Court: Those are the facts.

Q. All right, now, based upon those facts, where, in your opinion, did the collision take place on that bridge?

Mr. Alexander: Just a minute, just let me make an objection, Officer. That is objected to upon the ground that it calls for a conclusion of the witness, that it relates to a subject which is not a proper subject of opinion evidence, that no foundation has been laid for any such opinion.

The Court: Well, I think your objection is good, counsel, at this point, but in order to preserve the opportunity for counsel to do it, I'll reserve ruling on the objection and you may answer the question, but it is a matter you will have to submit authorities to me on.

Mr. Doepker: All right, I will submit the authorities to you later.

The Court: You may answer the question.

A. Would you read the question back, please?

(Question read back by Reporter.)

A. Well, I would say that the collision would have had to have taken place very near the front portion of this Pontiac in its present position, very near that, because there is no debris or anything which would lead me to believe it had taken place in another area.

Q. And on which side of the highway, north or south?

A. Well, it would be to the south of the center portion of the highway as I have concluded from what I saw there.



Q. All right, you may resume your place.

Mr. Doecker: The case of State vs. Bosch, your Honor, from Yellowstone County. I will give you the citation.

The substance of this specification appears in the Transcript of Record on page 237 through page 243 in which the witness, Douglas Hardesty, the highway patrolman, in attempting to show by competent evidence the point of the impact from the physical facts was continually hampered by counsel and was prevented by the Court from clearly setting out the reasons for his testimony and his conclusion.

No. 2. That the Court committed reversible and prejudicial error in refusing to permit the rebuttal testimony of Sheriff William C. Dove respecting a condition of the road east of the bridge which caused motorists to be pulled over the center of the bridge when driving from the east westerly on said highway. This specification is tied into the specification immediately proceeding because the highway patrolman when testifying was prohibited by the Court's rulings from testifying as to this condition which existed at the time of this accident on the highway immediately to the east of the bridge in question, and regardless of any technical objection as to its being proper rebuttal at the time, should have been permitted to be introduced so that the condition which was very material to the contention of the plaintiffs in these cases that the defendant's automobile swerved over the line and across into the southwesterly lane of traffic was entitled to be established in the Record to show that it was a material piece of evidence and should have been admitted by the Court.

No. 3. The Court erred in finding as a fact that matters stated in Findings of Fact Number II which was to the effect that the plaintiffs have failed to prove by preponderance the evidence that the injury or damages alleged in each and all of their Complaints were proximately caused by any negligence on the part of the defendant, Walter Schoepski, on the ground and for the reason that the evidence in the case, taken as a whole and particularly with the aid of the physical conditions that were shown by the testimony of the sheriff and the highway patrolman, indicated that it was Walter Schoepski's negligence and none other which resulted in the casualty which occurred on the bridge in question.

No. 4. The Court erred in finding as a fact the matters stated in Finding of Fact Number III to the effect that the defendant and cross complainant was operating his automobile on said bridge at the time of the collision aforesaid in a careful and prudent manner and on his own side of the road; that the said Mary A. O'Keefe, operating her automobile upon said bridge, negligently crossed over the center line and her said automobile collided with the automobile owned and driven by the defendant and cross complainant; that the proximate cause of said collision was the negligence of said Mary A. O'Keefe in crossing over the center line of said highway and into the lane of travel of said defendant and cross complainant on the ground and for the reason that the evidence in the case, taken as a whole and judged from the standpoint of the uncontradicted evidence of the highway patrolman and the sheriff and the other witnesses that came upon the scene, indicated that the negligence of the

defendant was the cause of the collision, the damages and that the driver of the automobile, Mary A. O'Keefe, throughout the travel over the bridge in question was in her own lane on the south side of the bridge, or south lane of the bridge.

No. 5. The Court erred in finding as a fact the matters stated in Finding of Fact Number V to the effect that all of the injuries were proximately caused by the negligence of Mary A. O'Keefe.

No. 6. The Court erred in its Conclusion of law Number III to the effect that the injuries to Walter Schoepski, the defendant and cross complainant, were sustained by him as a direct and proximate result of the negligence of Mary A. O'Keefe on the ground and for the reason that this Conclusion of law is entirely erroneous and clearly erroneous under the evidence in the case.

No. 7. The Court erred in its Conclusion of law Number IV on the ground and for the reason to the effect that Walter Schoepski, the defendant and cross complainant, had been damaged by Mary A. O'Keefe's negligence. On the ground and for the reason that the evidence in the case is entirely to the contrary and this Conclusion of law is clearly erroneous under the evidence.

No. 8. The Court erred in its Conclusion of law Number V to the effect that the defendant, Walter Schoepski, was entitled to the relief on the proof of special damages, and under the evidence a finding that Walter Schoepski was entitled to relief at all was contrary to the evidence in the case, and not supported by creditable evidence at all as the question of liability was concerned in the case.

No. 9. The Court erred in refusing to grant plaintiff's motions for amendment of Findings of Fact and Conclusions of Law because each and all of the paragraphs setting forth and requesting the amendment of the findings from page 52 of the Transcript through page 54 of the Transcript demonstrate that each and every one of these requested findings of fact were in accordance with the evidence of the case and should have been adopted by the Court.

No. 10. The Court erred in refusing to grant plaintiffs' motions for a new trial on all of the grounds heretofore stated in connection with the other findings of the Court which have been complained about, and because of the evidence in the case clearly shows that this motion for a new trial should have been granted.

Nos. 11. 12. 13. Points number 11, 12 and 13 all are based upon error in the Court in giving judgment in the three causes of action being considered by this Court, and these errors are based upon the matters heretofore related in its specifications of errors committed by the Court in this case where judgment should, under no circumstances, have been given for the defendant in any one of the three cases.

## ARGUMENT

The matter objected to in our Statement of Points number 1 was to have the highway patrolman, Douglas Hardisty, who had investigated over 2,000 accidents and had qualifications away beyond those of many highway patrolmen and who demonstrated by the testimony that he had previously given that he had made a very careful examina

tion of the evidences of the wreck upon the bridge and upon the automobiles in question was in the course of his testimony attempting to give the Court the benefit of his experience and to show where in his opinion the point of the collision between the vehicles involved occurred.

This was a very important point in the case and he was hampered and interfered with in the giving of this testimony and not permitted to relate it nor work it out so that the full benefit of his testimony could have been received in the case, and the Supreme Court of the State of Montana had in a previous case established that an experienced highway patrolman was a qualified witness to testify to similar facts from the evidences that he observed in connection with wrecks of automobiles after they had happened.

In that case of *State vs. Bosch* which is reported in 242 Pacific 2d at page 477, and which is commented on the Court at page 480 of the opinion, and at that time the matter was settled in the State of Montana that this type of evidence was admissible for the purpose and the only question which was presented to the Court was whether or not he would give weight to such testimony; and he should have been permitted to give this testimony without the interference that was demonstrated by the matter which has been objected to and which we say was error on the part of the Court in rejecting the evidence as was done; and particularly with respect to the testimony concerning a condition that existed to the east of the bridge which it will be apparent to this Court, upon reviewing the testimony that he was attempting to tell the Court competent evidence of a fact that existed at the east end of

the bridge that appears in the transcript at the bottom 240 and the top of the page 241, and it is shown by the segments of this testimony that when an automobile was traveling from east to west and didn't make a correction as you came over the brow of the hill to the east that the crown of the road slants from center to the northerly edge and that it was perfectly normal for a driver to correct his driving on that account and to tend to pull or guide his automobile to the left. The matter which he was testifying on was perfectly competent evidence and we were not confined to a hypothetical question because the witness was competent to testify of facts which he himself knew at the time, but the Court commented to the effect that in the first place that we were away off base, that he is now testifying and basing his opinion on something that isn't in the evidence, so lets go back; "if you can't ask him the proper hypothetical question, why it's just too bad. We are not going to have him testify—you better present the proper question to him, or the objection will be sustained. We are not going to let him ramble on. You see, he has already started to talk about something that is not in evidence."

We contend that here this witness was perfectly competent a witness and was one who could testify of this condition to the east end of the bridge and was a part of the consideration which he gave as to the probability that the defendant had guided his automobile over the center line to the south; and we respectfully contend to this Court that the manner in which this testimony went before the Court was such that its effect was destroyed and we were not permitted to present the evidence that we



had on the part of the highway patrolman, which included testimony which he knew of his own knowledge.

State vs. Bosch, 125 Montana 566; 242 Pac. (2d) 477.

Commencing at the bottom of the page 571 Montana Reports and decided in the early part of the year 1952 and this was the law of Montana at the time.

This was also the weight of authority on the subject:

Zelayta vs. Pac. Greyhound Lines, 232 P. (2d) at 579;

Grismore vs. Consolidated Products, 5 N.W. (2d) at 655.

89 C.J.S. Sec. 577 page 353 et seq.

Shopiro vs. Shopiro, Cal. 153 P. (2d) 62.

"Impatience and petulancy on the part of the trial judge do not create an atmosphere conducive of the best efforts of the participants in a trial. They stifle the advocates confidence that he is striving before an open-minded jurist; they intimidate the lay witness; they send away the litigant with the conviction that he has been dealt with unjustly. Withal, the state of mind developed by an impatient arbiter is not the parent of a wise discretion.

Shopiro vs. Shopiro, 153 P. (2d) 62;

Pratt vs. Pratt, 74 Pac. 742;

Chalfin vs. Chalfin, 236 P. (2d) 16.

Thereafter the court made findings that defendant sustained damages in the full amount claimed in the cross-complaint of defendant and an additional sum of \$6,774.67. Tr. pp. 19-48.

Did the plaintiffs have a fair and impartial trial? We believe not.

## POINT NO. 2

The Point Number 2. In view of the manner in which the testimony of the highway patrolman was restricted by this evidence, that at the conclusion of the trial at the first hearing, the Court ordered that if there was any rebuttal testimony that it should be put on immediately. There was still one witness whose testimony had to be considered and who was unable to testify at the time. During the interim, the plaintiffs studied the record and observed that the condition to the east of the bridge had not been clearly brought out in the manner that it could have been by witnesses who could have been obtained within a day or two at least. The condition of the record will show that the case was being tried at Havre, Montana. The sheriff of Phillips County resided at Malta, a distance of 90 miles to the east and there was no time to put him upon the stand immediately after the close of the evidence on the part of the defendant, therefore, in the interest of justice and fairness we contend that as long as the evidence had not been permitted on the direct examination at the time that the highway patrolman testified, we should have had the benefit of this testimony on the part of the sheriff, William C. Dove. The matter appears in the Transcript of Record:

“Mr. Alexander: Just a minute, to which we object on the ground and for the reason that it is improper rebuttal that in all events it would call for a conclusion of the witness, it would be incompetent, irrelevant and immaterial.”

The Court: Sustained.

Mr. Doepker: Your Honor, we would like to offer the testimony and make an offer of proof here that on the

date of this accident that this witness, Mr. Dove, knows from his own experience with driving down from the snoll of that hill to the bridge and upon the bridge that there was a contour or condition in the highway immediately to the east of the bridge, which would cause cars to follow the contour over to the south of the center of the bridge.

The Court: Well, your offer is denied for a great number of reasons. If it was admissible, it would have been admissible upon your case in chief, and no foundation has been laid for the testimony of the witness for the purpose for which you offer it, so the offer is denied. I don't care to hear any more argument about it.

Mr. Doepker: I am not going to argue it, if it is a question of foundation—

The Court: It is improper rebuttal, it is part of your case in chief.

Mr. Doepker: That is all, your Honor."

We contend that the Court had the power to take additional testimony and that it was better to have the merits of the case presented to him rather than to be unduly concerned with technical problems as to rebuttal and evidence introduced on the case in chief.

Under Rule 59, the Court could, even after judgment, citing Rule 59 a, also *Moore vs. United States*, 59 Federal Supplement 660; *U. S. vs. Colangelo*, 27 F. Supp. 921; *U. S. vs. Parisi*, 27 F. Supp. 922 opened the case for further testimony.

### POINTS 3 THROUGH 13

We will argue the remaining points urged together because they all relate to the question as to whether or not

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Mary O'Keefe, the driver of the Buick was responsible for this casualty.

We will honestly and fairly contend to this Court that the evidence which we earnestly say demonstrates that appellants should have had the decisions in this consolidated group of cases shows the decision of the District Court to be clearly erroneous.

As we approach the consideration of the facts involved, let us start with the place where the casualty took place and look at the surroundings so that we may judge the questions of ordinary care and caution on the part of the two drivers involved.

See Exhibits 7 and 8 of Plaintiffs' Exhibit 4.

## THE EVIDENCE CONCERNING THE CASUALTY

Raymond O'Keefe:

Raymond O'Keefe a resident of Ontario, Canada, was riding in a Buick '55 Hardtop Four Door which his wife was driving at around 9:00 o'clock slightly over twelve miles easterly from Malta, Montana, (Tr. p. 77) on the morning of August 30th, 1955.

Raymond O'Keefe testifies concerning the incline in the highway to the east of the bridge. (Tr. pp. 80-89.)

They left Havre twenty minutes to seven a. m. (Tr. p. 77). Their children, a boy and a girl were riding in the front seat. (Tr. p. 85.) Mary O'Keefe, his wife, has been driving automobiles for ten or twelve years or more she was 36 years of age on April 17th, 1955, and was driving her own automobile; Raymond O'Keefe was in the rear seat. (Tr. p. 78.)



Mary O'Keefe was driving on U. S. Highway Number 2 and for the last four or five years she had been driving motor vehicles every day, including tractors and trucks. (Tr. p. 78.)

As they traveled eastward that morning Mr. O'Keefe noticed that they had traveled 101 miles and this was somewhere within a mile of the bridge. (Tr. p. 78.) She stayed on her own right hand side and his best judgment of the speed was that she was traveling 40 to 45 miles per hour; she continued on her own or right hand side as she came upon the bridge and went through; she did not swerve away from her own right hand side. (Tr. p. 79.)

Mr. O'Keefe saw an automobile in the immediate vicinity by the bridge coming from the east and it was the car that was in the accident and he did not see any other cars in the immediate vicinity right at that time (Tr. p. 80.)

He saw the car coming down this incline and when it came very close to her it seemed to sway right at her. Mr. O'Keefe raised up in the back seat. (Tr. p. 80.)

Before this car was coming down the incline he did not see it down the highway to the east. (Tr. p. 81.)

Describing his remembrance of the collision he said: "Well as I saw this car coming at us, it seemed to be coming fast and swerved just before it got on top of her." (Tr. p. 82.)

Having memory of the circumstances immediately before the collision, the actual impact or collision took place toward the easterly end of the bridge and in the instant immediately before the collision the Buick car was near the right rail. (Tr. pp. 82 -83.)

The impact between the two cars occurred as the Pontiac hit the front end of the Buick (Tr. p. 83.)

Immediately after the collision the Buick turned in northerly or left hand direction into the ditch or barrow pit. Observing the position of the left front wheel, it was driven upwards and back and the movement of the Buick after the collision followed the crushed position of the front wheel and it came to stop east of the bridge in the barrow pit. (Tr. p. 83.)

Observing the position of the Pontiac right after the collision, it was on the bridge heading to the left at an angle to the south side and the front end was across the center line. (Tr. p. 84.)

Referring back to the time right before the collision Mr. O'Keefe had observed the bridge at quite a ways. Giving an estimate he said it was four or five hundred feet right at that time there was no traffic visible coming from the other direction; as the Buick neared the bridge and when he was roughly forty feet back or so the Pontiac came into sight and he placed it at one hundred feet or so from the bridge on the east side; it appeared to be coming pretty fast. (Tr. p. 90.)

The Buick was traveling eastward at 40 to 45 miles per hour.

(Here we call attention that if the Buick and the Pontiac were traveling toward each other at approximately the same speed the force of an impact between them would be equivalent to the force of 90 miles per hour.)

When Mr. O'Keefe saw the Pontiac a hundred feet from the bridge it was on its own right side of the road and it continued on its right side until it got near or en-

tering the bridge, one of the two, he would say that the Pontiac left its own side of the road as it was coming into the bridge and then it turned right towards the oncoming Buick (Tr. p. 90.)

As Mary O'Keefe entered the bridge she was about a foot from the rail and she seemed to crowd over a little closer to the rail shortly after she entered the bridge; she quite likely saw the other car too. (Tr. p. 91.)

As she crowded over closer to the rail the Pontiac was coming over the center, how far Mr. O'Keefe was unable to tell; the Pontiac came over the center about two-thirds of the way to the east end and Mrs. O'Keefe had come two-thirds of the way in the Buick (Tr. pp. 92-93).

The Pontiac was over at a good angle. (Tr. p. 93.)

Mr. O'Keefe had said that the Pontiac seemed to jump at the Buick like a frog. (Tr. p. 93.)

Mr. O'Keefe's estimates were that the Buick was approaching about 40 feet from the west end of the bridge when the Pontiac was approaching 100 feet from the east end of the bridge. (Tr. pp. 89-90.)

The foregoing testimony of Raymond O'Keefe correctly tells how this unfortunate tragedy happened as is abundantly demonstrated by all the reliable physical evidence in the case.

To substantiate this statement we will review the evidence which shows that Mr. O'Keefe remembered it as it happened.

The survivors of this terrible wreck are and should be in the best position to know what happened.

Mrs. Schoepski does not remember anything at all about it because of retrograde amnesia which she suffered.

Walter Schoepski testified that as he came along the highway he observed the 'Narrow Bridge' sign and as he came over the knoll the bridge appeared to be narrow compared with the road; didn't recall that his car had a tendency to pull to the left as he came over the knoll; he tried to stay as close as he could to the north rail that was what he was watching. As he came over the knoll he saw the Buick approaching; he didn't see anything about it that caused him to be concerned and he did not see the Buick off of its lane at any time as he went upon the bridge; and as he was coming on the bridge on one side, the Buick was coming on the bridge on the other side.

No witness would be in better position than Mr. Schoepski to see that the Buick automobile was in its own lane coming on the bridge.

Certainly then there is no dispute about this fact as the two principals, Mr. O'Keefe and Mr. Schoepski agree that such was the fact.

WE CONTEND THAT WITH THE BUICK IN ITS OWN LANE, GOING ON TO THE BRIDGE AT 45 miles per hour, in one second traveled 67 feet into the bridge AND THAT IS TO OR PAST THE POINT OF IMPACT. ALL OF THE RELIABLE EVIDENCE SUSTAINS US ON THIS POINT.

Let us look at the record:

Plaintiffs' exhibit 9, a 3-D Stereo clearly shows that the left front of the Buick automobile is crushed backward from the letter "K" of Buick on the front over the entire left front. This letter "K" would be about 3 inches from the left side.

We contend that this photograph demonstrates a force striking more or less diagonal toward the right side of the Buick. The front of the wheel is pushed backwards and upwards and the front of the right wheel is turned to the left.

Plaintiffs' exhibit 10, a 3-D Stereo confirms that the crushing force was diagonal towards the right side of the Buick.

Plaintiffs' exhibit 8, 3-D Stereo, shows the front of the Pontiac indicating that from the center to the left of the Pontiac there was a direct blow into the Buick. Note the hole to the left and the punched out hole to the right of the center of the front of the Pontiac. This was no sideways blow but a direct blow. It was not hooked and dragged to the left but directly pushed into collision with the Buick. (We will substantiate this later from the testimony of a mechanic who examined the frame of the Pontiac.)

An examination of photos 14 and 15 backs us up in our contention.

As Mr. O'Keefe testified the Pontiac came at the Buick at a good angle.

We contend that the Pontiac was pushed back and to the left as the Buick continued through in the lane that Mr. Schoepski saw it in. After the impact, the driverless Buick scraped its right side along the rail and a portion of the front left side scraped along the front of the Pontiac as it was forced back towards the north rail and lifted so the bumper scraped the top rail at a point 25 feet and 4 inches from the east end of the bridge.

The Buick was literally pushed sideways against the south railing of the bridge as it went through. Plaintiffs' exhibits 11, 12, 13, 14, 15 and 16 prove this beyond question. It will be observed that there was no scraping from the front bumper back to the first of the three holes in the right front fender but a continuous scraping from the first of the three holes back to the rear bumper which unquestionably made the gouge shown in plaintiffs' exhibit Number 7.

If we bear in mind that the Buick was  $76\frac{1}{4}$  inches wide as it lay against the railing on the bridge there was more than three feet that the Pontiac extended over into the Buick lane.

We look at picture Number 3 of plaintiffs' exhibit Number 4 and we know from the evidence that the mark shown on the top rail of the north side of the bridge is just west of post number five from the east or 25 feet 6 inches from the east end of the bridge.

We further know from the evidence that the heavy damage on the south rail of the bridge starts at post seven from the east end of the bridge which is approximately 35 feet further west.

It is clearly apparent from the evidence that the Pontiac automobile, after striking the left front end of the Buick automobile, was pushed back and sideways to get it into the position that is shown in the photograph number 3.

Then let us look at photograph number 11 of plaintiffs' exhibit number 4 and by comparing the two pictures, 10 and 11, we can easily visualize how this collision occurred.



The Buick automobile was traveling east in approximately the position of the cab of the wrecker shown in picture number 11 and if we move the Pontiac forward and sidewise to the south it demonstrates exactly, considering the diagram, plaintiffs' exhibit Number 34, how this accident occurred.

The Witness, Mr. Long, testified concerning the condition of the Pontiac which indicates that the Pontiac struck the Buick and was not hooked and pulled outward by the Buick. Testifying to the crease which shows in the top of the Pontiac, he related that the frame on the left hand front corner of the unit was very badly damaged and driven back considerably toward the cowl of the unit. The frame was not broken. It was just badly damaged and bent. The body of the Pontiac was pretty much in line on the left hand side or on the right hand side. However on the left hand corner it was driven back and buckled in next to the body; the whole right hand side of the Pontiac was buckled down more than sideways. (Tr. pp. 299 to 301.)

We get further assistance in our study by using the 3-D slides. See exhibit Number 17 which shows that our contention is correct when we say the Pontiac forced the Buick into the guard rail. The testimony shows that the rear bumper of the Buick cut the second rail of the bridge on the south side in the fashion indicated as the Buick continued eastward in its lane. This mark is made between the sixth and seven posts from the east on the south side of the bridge.

The same situation is shown in plaintiffs' exhibit 7.

Plaintiffs' exhibit 18 is a closeup of the same area showing the paint scraping and the markings extending to the

west at a point 45 feet from the east end of the bridge.

Plaintiffs' exhibit 19 shows a 3-D slide 40 feet from the east end of the bridge.

Plaintiffs' exhibits 20, 21, 22 and 23, 3-D Stereos show that the Buick was pushed against the south rail for a distance of 20 to 45 feet from the east end of the bridge.

The testimony of Sheriff Dove and Patrolman Hardesty clearly demonstrate that the collision took place south of the center of the bridge. There is not one piece of physical evidence indicating that the Buick was north of the center line on the bridge as it traveled eastward.

Reading this testimony, in connection with plaintiff exhibit number 34, shows that Raymond O'Keefe's eyewitness account of the happening of the casualty is exactly what happened.

Mr. Schoepski was certainly not keeping a proper lookout and certainly was not observing where he was driving when he swerved across the center line or center portion of the bridge where he completely failed to keep the Pontiac automobile under control.

Coming over the knoll shown in 3-D Stereo, plaintiff exhibit number 25 and seeing the Buick approaching in its own lane about 40 feet west of the bridge, he should have permitted the Buick automobile to pass over the bridge before he entered the same.

The highway was perfectly straight and wide ahead of him and he knew the Buick would reach the bridge first.

Was it because he had been traveling six hours steadily without a break?

Was he too old and never should have made the trip?  
(Tr. p. 28.)

The physical evidence on the bridge shows conclusively how this accident happened because Mr. Schoepski came over the center line into the south lane and crashed his automobile against the Buick driven by Mary A. O'Keefe.

We have not quoted from the testimony of Pat West the star one hundred per cent quantity witness of the appellee, nor that of Mabel Keough who, we contend, was an honest witness. We ask the Court to study the testimony of these two defense witnesses and it will become completely convincing that Pat West did not tell the truth in the case. He either forgot or deliberately became partisan and testified to impossible things concerning this collision. There is not one line of testimony to the effect that there was any post-collision debris at any place on the north side or north half of the highway except under and to the east of the Pontiac car, indicating beyond question that the collision took place on the south side.

Please study the testimony of patrolman Hardesty, a disinterested highway patrolman with the abundant facts which he observed as he came to investigate the accident demonstrates that he pin-pointed the point where the cars collided. We know definitely from the testimony of Stanley Hould and the highway patrolman that the Buick was lightly touching the south rail from this gouge mark westerly. We say that the witness, Pat West, was testifying from reasoning and observation, such as it was, rather than what he actually saw. He was coming over the knoll of the hill, and trying to pass Mabel Keough's panel laundry truck. She observed the actual collision. He could not have done so. He pulled up beside her and he was not following the Pontiac automobile as he told. A glaring in-

consistency in the testimony of Mrs. Mabel Keough and Pat West demonstrates that with the support which his testimony receives from the other witnesses that arrive at the scene that Pat West was mistaken. We do not contend that he did not aid and assist in removing Mr. and Mrs. Schoepski from the Pontiac car. We contend that he did not pass through the space between the Pontiac and the south rail of the bridge because he could not have done so. Mrs. Keough did not pretend to fix the relative positions of the cars at the place of collision. She testified that the Pontiac entered the bridge on its own side. All witnesses agree that this was a fact—that Mr. Schoepski came upon the bridge on his own side.

After a careful analysis of the law, we submit the following additional cases for the consideration of the Court:

- Morton vs. Mooney, 97 Mont. 1, 33 P. (2d) 26 (Mont.);
- Inkret vs. C. M. St. P. & P. Ry. Co., 107 Mont. 394, 86 Pac. (2d) 12 (Mont.)
- Dahl vs. Spotts, (Cal.) 16 Pac. 100 at 104;
- Market St. Ry. Co. vs. George, 3 Pac. (2d) 41 43 (Cal.);
- Hart vs. Kline, (Nev.) 116 Pac. (2d) 672 at 674
- Oregon Motor Stages vs. Portland Traction Co. 255 P. (2d) 558 at 561 (Ore.);
- Cameron vs. Goree, 189 P. (2d) 596 at 604 (Ore.)
- Haarstrich vs. Oregon Short Lines R. Co., (Utah) 262 Pac. 100 at 104;
- Poland vs. City of Seattle, (Wash.) 93 P. (2d) 380 at 384.

The above cases say that testimony contrary to physical facts will not support a verdict or a decision of the Court.

based upon testimony contrary to the physical facts.

We respectfully submit that this entire evidence, particularly the physical facts of the case, demonstrate that the Court's decision in this case was clearly erroneous and that the decision should be reversed.

See the following cases that show the recognition of the testimony of the Highway Patrolman as strong testimony based on the physical facts shown by an investigation of a highway accident.

Jackson vs. Vaughn, 204 Ala. 543, 86 So. 469;

Vallejo R. Co. vs. Reed Orchard Co., 169 Cal. 545,  
571, 147 P. 238-250;

Manney vs. Housing Authority, 79 Cal. App. (2d)  
453, 180 P. (2d) 69;

People vs. Haeussler, 260 P. (2d) 13.

Respectfully submitted  
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